

(1989) 02 KL CK 0042
In the High Court Of Kerala
Case No : M.F.A. No. 410 of 1987

New India Assurance Co. Ltd.

APPELLANT

Vs

Raju Markose and Others

RESPONDENT

Date of Decision : 27-02-1989

Acts Referred:

Motor Vehicles Act, 1939 — Section 110C, 92A, 96(1), 96(2)

Citation : (1989) 2 ACC 22 : (1989) ACJ 643 : (1990) 67 CompCas 528 : (1990) 1 ILR (Ker) 139

Hon'ble Judges : P.C. Balakrishna Menon, J; P. Krishnamoorthy, J

Bench : Division Bench

Advocate : P.V.R. Kaimal, for the Appellant; P.N. Ramakrishnan Nair, for respondents Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrishna Menon, J.—The second respondent-insurer appeals against the award of the Motor Accidents Claims Tribunal, Quilon, in O. P. (M. V.) No. 206 of 1985 directing the insurer to pay compensation of Rs. 2,10,000 to the petitioners for the death of their mother, Grace Markose, in a car accident, on December 7, 1978.

2. The claim was for compensation of Rs. 6,00,000 from respondents Nos. 1 and 2. The first respondent is none other than the father of the claimants. The claimants are minors represented by their next friend.

3. The car KLI 1050 belonged to the first respondent. The first respondent himself was driving the car bringing his children home from their boarding school at Trivandrum. Their mother, Grace Markose, was in the front seat. The accident took place at 5.30. p. m. at a road junction on the M. C. Road, south of Kottarakkara town. The vehicle capsized causing serious injuries to Grace Markose. She succumbed to the injuries on the same day at about 9 p. m. The petitioners are the children of Grace Markose and the first respondent. They

claim compensation for the death of their mother who was a medical officer in the St. John's Hospital, Kattappana, drawing a salary of Rs. 2,500 per month. The case was posted from time to time and on March 6, 1981, it was posted to April 4, 1981 allowing the respondents a last chance to file written statements. The second respondent-insurer filed a written statement on April 4, 1981. No written statement was filed by the first respondent. Much later, on May 8, 1981, the first respondent filed a written statement wherein he has raised a contention that the liability, if any, is of the Insurer as the vehicle is covered by a policy of insurance. According to him, the cause of death of Grace Markose was an accident and not due to his negligence. The second respondent-insurer disclaimed its liability to compensate the petitioners for the death of Grace Markose in the accident. The Tribunal found rashness and negligence on the part of the first respondent as, according to the Tribunal, the accident speaks for itself. The Tribunal awarded a consolidated sum of Rs. 2,10,000 as compensation. The award is against both respondents Nos. 1 and 2. But the second respondent insurer is directed to pay the amount and on failure of payment, there is a further direction that execution steps should be taken first against the second respondent-insurer.

4. In the petition itself, it is stated "the accident involving the death of the deceased was only accidental". There is no averment of rashness or negligence on the part of the first respondent in driving the vehicle. The first respondent in his written statement, though filed at a belated stage, had also raised a contention that the accident was not due to negligence on his part. When examined as R. W. 1, the first respondent spoke about the incident as a pure accident which could not have been avoided by him while driving the vehicle. P. Ws. Nos. 1 to 4 examined on behalf of the petitioners also spoke about the incident as a pure accident. There is neither pleading nor proof that the accident was due to negligence on the part of the first respondent. A Division Bench of this Court in *K.A. Kurup v. P. Sukumaran Nair* [1980] KLT 750, following the decisions of the Supreme Court in *Minu B. Mehta v. Balkrishna Ramchandra Nayan* [1977] 47 Comp Cas 736 and *Bishan Devi v. Sirbaksh Singh* [1981] 51 Comp Cas 128 (SC), stated at page 751 :

"A liability can be cast on another only if he is in any way responsible for the accident which occasioned the injury. In other words, there is no scope for any absolute liability on the owner of the vehicle to compensate the injured. The provisions of the Motor Vehicles Act do not contain any statutory provision to that effect. The Act does not provide a new right or a new remedy to a person who is injured by an accident. The provisions of the Act do not in any way interfere with the substantive common law on the subject. It follows that the petitioner has to prove that the opposite party used the vehicle in such a negligent way and occasioned the injury for which compensation is claimed."

5. In *Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another*, referred to above, the conclusion is stated at page 751 :

"We conclude by stating that the view of the learned judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case."

6. The accident in the present case was on December 7, 1978, long before Section 92A of the Act came into force. Section 92A was introduced by the Amendment Act 47 of 1982 that came into force with effect from October 1, 1982. Section 92A introduced by the amendment dispenses with proof of negligence in the matter of award of compensation to the extent indicated therein. The section indicates that the substantive law is changed only to the extent altered by the Amending Act. In Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another,), it is stated at page 620 :

"Section 92A of the Act provides that where the death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicle shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of the said section. The amount of compensation which is payable thereunder in respect of the death of any person is a fixed sum of fifteen thousand rupees and the amount of compensation payable under it in respect of the permanent disablement of any person is a fixed sum of seven thousand and five hundred rupees. Sub-section (3) of Section 92A of the Act provides that in any claim for compensation under Sub-section (1) of Section 92A, the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. It is thus seen that to a limited extent relief has been granted u/s 92A of the Act to the legal representatives of the victims who have died on account of motor vehicle accidents. Now they can claim Rs. 15,000 without proof of any negligence on the part of the owner of the vehicle or of any other person. This part of the Act is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident. To that extent, the substantive law of the country stands modified."

7. It is thus clear that but for the modification, thus effected, the substantive law continues to be in force and no claim for compensation is sustain-able without proof of negligence except to the extent such proof is dispensed with by Section 92A of the Act.

8. In the present case, the petition itself shows that there was no negligence on the part of the first respondent who was driving the vehicle at the time of the accident. The evidence of all the witnesses examined on behalf of the petitioners

as well as of the first respondent examined as R. W. 1 also is to the same effect. We are, therefore, clearly of the view that no case has been made out for award of compensation in the present case.

9. Counsel for the respondents submits that the defences open to the insurer are only those enumerated in Sub-section (2) of Section 96 and a plea that the accident was not due to the negligence of the first respondent is not available to the second respondent. It is also contended that such a defence cannot be the basis of an appeal u/s 110D of the Motor Vehicles Act. Counsel for the respondents relies on the decision of a Division Bench of this court in *New India Assurance Co. Ltd. v. Radhakrishnan* [1983] KLT 547 wherein it is held that it is not open to the insurer to canvass the merits of the award by reason of the prohibitions contained in Sub-sections (2) and (6) of Section 96 of the Motor Vehicles Act. The restrictions in regard to the defences available to an insurer relate to the insurer's liability u/s 96(1) and in a case where there is no such liability, there is no question of the defences being restricted as provided for u/s 96(2) of the Act. That apart, in the present case, the insurer is also entitled to take all the defences by virtue of the provisions contained in Section 110C of the Act. As adverted to earlier, the first respondent did not file a written statement within the time allowed by the Tribunal. It is seen that a written statement was filed subsequently without even furnishing a copy of the same to the insurer. There was also no petition to receive the written statement. The written statement filed at a belated stage was not even brought to the notice of the Tribunal and it is apparently for that reason that the Tribunal, in its order, has stated that the first respondent had not filed any written statement in the case. The insurer was impleaded as a party to the proceedings by the petitioners themselves, and the insurer is entitled to contest the claim on all or any of the grounds available to the first respondent by virtue of the provisions contained in Section 110C of the Act.

10. For the aforesaid reasons, we allow the appeal and set aside the award of the Tribunal as against the appellant. The parties will suffer their respective costs.